APPEAL NO. 93446

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 1.01 through 11.10 (Vernon Supp 1993). On May 7, 1993, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. She determined that appellant (claimant) was not injured in the course of employment and that the employer did not receive timely notice with no good cause for the claimant's failure to provide such notice. Claimant appealed both the injury issue and notice issue as against the great weight of the evidence. Respondent (carrier) replies that the decision is not against the great weight and preponderance of the evidence.

DECISION

We affirm.

At the hearing the issues were stated to be: (1) was the claimant injured as a result of an accident of (date of injury); and, (2) did the claimant have good cause for not timely reporting the injury?

Article 8308-6.42(c) of the 1989 Act states that the Appeals Panel "shall determine each issue on which review was requested." The claimant asserts three issues on appeal: (1) the claimant was injured in the course of employment on (date of injury); (2) the claimant had good cause to delay reporting the injury past 30 days; and, (3) the employer had constructive notice of the injury.

The Appeals Panel determines:

That the great weight and preponderance of the evidence does not indicate that the hearing officer erred in finding that the claimant was not injured as a result of a fall on stairs at her place of employment.

That the great weight and preponderance of the evidence does not indicate that claimant had good cause to delay reporting her injury past the 30 day time limit set forth in the 1989 Act.

That the great weight and preponderance of the evidence does not indicate that the employer had actual notice of injury within the 30 day time limit provided for notice in the 1989 Act.

Claimant is a secretary for (employer); she was going up some stairs at work on (date of injury), when she slipped. She testified that she was carrying papers to be forwarded and that the stairs are open so that if she dropped the papers they could be hard to retrieve. She states she missed a step, lunged forward to catch the papers, twisted her body, made a complete turn, and landed by sitting down on a stair on her left buttock. Claimant did not testify that she told any supervisor of her injury until after 30 days, after she saw (Dr. D),

who she saw no earlier than July 29, 1992. She also told the employer's nurse about the fall at work, but not until after she saw Dr. D. In addition to this fall, claimant also referred to another fall about one week earlier than the one in question, also at work.

(JB) testified that on (date of injury), he worked as an engineer for employer (he is no longer with employer). Claimant was one of several secretaries that typed for him. He did not rate her and did not consider himself a supervisor. He was in the area of the stairs and saw "motion" in the corner of his eye. He did not see a fall, "[a]nd I looked up, and she was in motion already getting back up . . . ." He said also that claimant missed some work, but indicated that it was not immediately thereafter, "was sometime later."

A statement was taken from (MR) who is a secretary for employer. The stairs are near her desk and she stated, "I heard her fall and when I, when I got up, I mean when I you know jumped up from my chair to see if she's alright, she was you know down on the stairs." She added, "I think one knee was on one stair and one was on the other." She did not see claimant twist and said claimant was facing down or as
if she were going up the stairs. Claimant, she said, got up quickly and indicated that she was not hurt.

Claimant testified that she first saw employer's nurse either two days after the fall or several days after the fall. She had a pain in her leg, a tingling sensation, which she said the nurse viewed as possibly due to varicose veins; she did not mention a fall at this time. She tried to see a doctor but because of problems with appointments, first saw (Dr. B) on June 26, 1992. Dr. B noted complaints of pain in the hamstring area and recorded, "no known injury. Has been dancing recently." Dr. B also indicated that she reported pain for three weeks, describing difficulty sleeping and increased pain when the knee is bent. X-rays of the left knee taken on July 10, 1992, were normal. On July 17, 1992, her knee pain was not resolving, and claimant was referred to Dr. D. Dr. D's records show that he saw her on July 29 or 30 and August 4, 1992. On July 30, 1992, Dr. D mentions a "confusing history" of leg problems. On August 4, Dr. D notes "fall at work;" this is the first indication in medical records of a history of a fall. Dr. D in a typewritten note also dated August 4, 1992, says claimant reported falling twice at work. Dr. D evaluated both knees as "essentially normal." He noted tenderness to the lower back "which the patient was not aware of." On her next visit he noted pain in her back and indicated he would perform testing.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. As trier of fact she could believe some, but not all of the testimony given by the claimant. *See* Ashcraft v. United Supermarkets, Inc., 758 S.W.2d 375 (Tex. App.-Amarillo 1988, writ denied). While the claimant appears to have pain, the medical records do not raise a question of a fall until almost two months after the event. While medical data is not necessary to prove injury, it may be considered when present by the hearing officer. *See* Texas Workers' Compensation Commission Appeal No. 92167, decided June 11, 1992. Similarly, while claimant's fall does not have to be witnessed to be compensable, when it is witnessed, the observations of the witnesses may

be considered by the hearing officer; any conflicts between the witnesses and the claimant are for the hearing officer to evaluate. *See* Ashcraft, *supra*. The hearing officer could determine, with sufficient evidence, that the claimant did not show a clear, logical, sequence of events indicating that she injured herself in the scope of employment.

Claimant reported to her first physician in late June that she had pain in her knee and hamstring. Her testimony indicated that she did not know what was causing the pain. This is somewhat buttressed by the medical record referring to dancing. Claimant acknowledged that she gave no notice until after 30 days elapsed. The hearing officer is the trier of fact; she could conclude that claimant did not give timely notice, could believe that claimant did not know the basis for her pain, and that claimant did not realize she had a duty to report within 30 days. *See* Lee v. Houston Fire & Cas. Ins. Co., 530 S.W.2d 294 (Tex. 1975), which said that it was generally a fact question of claimant's prudence in deciding an issue of good cause for late filing. The court in Lee also said that ignorance of filing requirements did not excuse a failure to comply. *Also see generally*, Texas Workers' Compensation Commission Appeal No. 91030, decided October 30, 1991. The evidence is sufficient to support the hearing officer both in her findings and in her conclusion that claimant did not have good cause for delay.

Actual notice by the employer is also asserted on appeal. In Miller v. TEIA, 488 S.W.2d 489 (Tex. Civ. App.-Beaumont 1972, writ ref'd n.r.e.) the court described the issue as a question of fact which the fact finder could find on behalf of the claimant when a supervisor knew claimant fell approximately five feet from a truck bed onto asphalt although he did not miss work but slowed down within 30 days. Even if JB is considered to hold "a supervisory or management position," the facts of the case before us are no stronger for claimant than are those in Miller; as a result, the question of actual notice was also for the hearing officer to determine. There was sufficient evidence for the fact finder to find that the employer did not have actual notice.

Finding that the decision and order are not against the great weight and preponderance of the evidence, we affirm.

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Joe Sebesta
Appeals Judge

CONCUR:

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Stark O. Sanders, Jr.
Chief Appeals Judge

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Robert W. Potts
Appeals Judge